



Rono & 8 others v Kenya Forest Service & 4 others (Environment and Land Miscellaneous Application E102 of 2024) [2024] KEELC 5247 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E102 OF 2024**

**JO MBOYA, J
JULY 11, 2024**

BETWEEN

- ELASCO RONO 1ST APPLICANT**
- STEPHEN PANDUMUNYE 2ND APPLICANT**
- WILLIAM KILAGAT KALEGU 3RD APPLICANT**
- JOSEPH K. SANG 4TH APPLICANT**
- ZAKAYO LESINGA 5TH APPLICANT**
- JAMES RANA 6TH APPLICANT**
- JULIUS SITONIM 7TH APPLICANT**
- SAMSON MURENO 8TH APPLICANT**
- WILLIAM SERONEY TIWAS 9TH APPLICANT**

AND

- KENYA FOREST SERVICE 1ST RESPONDENT**
- NATIONAL LAND COMMISSION 2ND RESPONDENT**
- REGIONAL CO-ORDINATOR RIFT VALLEY REGION 3RD RESPONDENT**
- ATTORNEY GENERAL 4TH RESPONDENT**
- NAKURU COUNTY COMMISSIONER 5TH RESPONDENT**

RULING

1. The Applicants’ herein have approached the court vide Notice of Motion Application dated 6th June 2024 and in respect of which same [Applicants] have sought for the following reliefs:



- i. That the Application be certified as urgent and service of this Application be dispensed with in the first instance.
 - ii. That pending the inter-partes hearing and determination of this Application, the court be pleased to issue an order of temporary injunction restraining the 1st Respondents [sic], either by themselves, their agents, servants and/or anybody claiming under them from tearing down structures, selling, transferring, leasing, allocating land, tampering with, engaging in any construction thereupon and/or in any other way dealing with the land belonging to the Applicants herein located in Mariashioni Location, Elburgon Division, and Njoro Division within Nakuru County within and/or at the outskirts and/or interfering with the Applicants; occupation and possession of their property located in the outskirts of Mau Forest and/or interfering with the Applicants' occupation and their property in line with Judgment issued on 17th March 2021 pending resettlement.
 - iii. That pending the inter-partes hearing and determination of this Application, the court be pleased to issue an order of permanent injunction restraining the 1st Respondents, either by themselves, their agents, servants and/or anybody claiming under them from tearing down structures, selling, transferring, leasing, allocating land, tampering with, engaging in any construction thereupon and/or in any other way dealing with the land belonging to the Applicants herein located in Mariashioni Location, Elburgon Division, and Njoro Division within Nakuru County within and/or at the outskirts and/or interfering with the Applicants; occupation and possession of their property located in the outskirts of Mau Forest and/or interfering with the Applicants' occupation and their property in line with Judgment issued on 17th March 2021 pending resettlement.
 - iv. That costs of this application be borne by the Respondent
2. The instant Application is premised and/or anchored on the various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of one Patrick Kuresoi [but who is not a party to the suit].
 3. Upon being served with the Application beforehand, the 1st, 3rd, 4th and 5th Respondents duly entered appearance and thereafter filed Grounds of Opposition dated 8th July 2024 and in respect of which the named Respondents have contended inter-alia that the subject Application is not only misconceived but same is legally untenable.
 4. Suffice to point out that the application beforehand came up for hearing on 11th July 2024, whereupon the Advocates for the respective parties covenanted to canvass and dispose of the Application by way of oral submissions. In this respect, the Application thereafter proceeded for hearing vide oral submissions.

Submissions By Parties

- a. Applicants' Submissions
5. Learned counsel for the Applicants adopted and reiterated the contents of the Supporting Affidavit and the annexures thereto and thereafter raised and highlighted two (2) salient issues for consideration by the court.
 6. Firstly, learned counsel for the Applicants submitted that the Applicants herein have raised and demonstrate a prima facie case with probability of success and hence the court ought to grant the orders of temporary injunction in the manner sought at the foot of the Application. For coherence, learned



counsel invited the court to take cognizance of the decision in the case of *Giella v Cassman Brown* [1973] EA.

7. Secondly, learned counsel for the Applicants also submitted that the 1st Respondent was keen to undertake eviction as against the Applicants and the imminent eviction, is likely to subject the Applicants to a state of destitution.
8. Arising from the foregoing, learned counsel for the Applicants therefore invited the court to find and hold that the consequences of the imminent eviction, is likely to occasion reparable loss to the Applicants, unless same is restrained by way of order of injunction.
9. In a nutshell learned counsel for the Applicants, implored the court to find and hold that the application beforehand is meritorious and thus ought to be granted.

(b) Respondents' Submissions

10. Learned counsel for the 1st, 3rd, 4th and 5th Respondents adopted and reiterated the contents of the grounds of opposition dated 8th July 2024 and thereafter raised two (2) pertinent issues for consideration by the court.
11. First and foremost, learned counsel for the named Respondents submitted that the proceedings before the court and wherein the Applicants are seeking for an order of temporary injunction, are premature and misconceived. In this regard, learned counsel contended that an application for temporary injunction cannot be made and/or mounted on the basis of an application, albeit without a substantive suit having been filed.
12. Pertinently, learned counsel for the named Respondents submitted that the prayer for temporary injunction which has been sought for, albeit without their being a substantive suit, has been sought for in vacuum and thus same cannot issue. For good measure, learned counsel for the named Respondents invited the court to take cognizance of the provisions of Section 19 of the *Civil Procedure Act*; Order 3, Rule 1 of the *Civil Procedure Rules* and Order 40, Rule of the *Civil Procedure Rules 2010*.
13. Secondly, learned counsel for the named Respondents has submitted that the other relief that has been sought for by the Applicants in terms of prayer 3 of the Application relate to an order of permanent injunction, which counsel contended cannot issue and/or be granted at the interlocutory stage or otherwise.
14. Finally, learned counsel for the named Respondents also submitted that the cause of action is indicated to have arisen at Elburgon and Njoro Divisions, within the County of Nakuru but the suit herein has been filed herein at Nairobi. In this regard, counsel contended that the filing of the instant suit in Nairobi constitutes an abuse of the due process of the court.
15. At any rate, learned counsel posited that the Environment and Land Court at Milimani, is divested of the requisite jurisdiction to entertain and adjudicate upon the subject dispute. Instructively, learned counsel submitted that the suit ought to have been filed before the Environment and Land Court situate at Nakuru.
16. Arising from the foregoing, learned counsel for the named Respondents invited the court to strike out the subject proceedings and to awarded costs to the Respondents herein.



Issues For Determination

17. Having reviewed the Application and the responses filed thereto and upon consideration of the oral the submissions ventilated by and on behalf of the parties, the following issues crystallize and are thus worthy of determination;
 - i. Whether the subject application is competent/tenable in the absence of a substantive suit to underpin same.
 - ii. Whether an order of permanent injunction can issue and/or be granted at the interlocutory stage and in any event on the basis of an application.

Analysis And Determination

Issue Number 1

Whether the subject application is competent/tenable in the absence of a substantive suit to underpin same.

18. The Applicants before the court are seeking inter alia orders of temporary and permanent injunction, to issue against the Respondents herein as pertains to [sic] the properties situate within Elburgon and Njoro Divisions, in the County of Nakuru.
19. To the extent that the Applicants herein are seeking for inter alia an order of temporary injunction, it was incumbent upon the Applicants to demonstrate and/or prove to the court that same have placed before the court a prima facie case. In this regard, there is no gainsaying that there must be a case, which discloses prima facie arguable issues, which the court will be called upon to engage with and/or determine during the plenary hearing.
20. Suffice to point out that the Application for temporary injunction, like the one beforehand, would then be mounted and/or filed in the suit wherein the Applicants would be seeking some substantive reliefs and not otherwise.
21. Be that as it may, the Applicants herein have not filed any suit and yet same are before the court seeking for an order of temporary injunction. Quiet clearly, the application for temporary injunction and the orders sought thereunder, have been made and/or mounted in vacuum.
22. Simply put, it behooves the Applicants to file and/or commence a proper suit in the manner envisaged by the provisions of Section 19 of the *Civil Procedure Act*, as read together with Order 3, Rule 1, of the *Civil Procedure Rules 2010*.
23. Furthermore, it is not lost on this court that an application for temporary injunction must be mounted in accordance with the provisions of Order 40 Rule 1, of the Civil Procedure Rules, which essentially underscore that such an application can only be made in a suit and not otherwise.
24. To this end, it suffices to reproduce the provisions of Order 40 Rule 1, of the *Civil Procedure Rules 2010*. Same are reproduced as hereunder;
 - “ 1. Cases in which temporary injunction may be granted [Order 40, rule 1.] Where in any suit it is proved by affidavit or otherwise –
 - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”
25. Arising from the foregoing, it is my finding and holding that in the absence of a substantive suit to anchor and/or underpin the subject Application, the entire Application and the reliefs sought thereunder, have been mounted in vacuum and thus same are not maintainable.
26. Before departing from this issue, it suffices to underscore that the procedure for approaching the jurisdiction of the court is not only a procedural issue, which can be cured vide invocation of the provisions of Article 159 (2) (d) of the Constitution. To the contrary the procedure for approaching the jurisdiction of the court is a fundamental and jurisdictional question, which goes to the root of the matter and thus where the jurisdiction of the court is improperly invoked, the impugned matter is rendered annulity.
27. To buttress the foregoing observation, I adopt and reiterate the succinct exposition of the law by the Court of Appeal in the case of Scope Telematics International Sales Limited v Stoic Company Limited & another [2017] eKLR, where the court stated and held as hereunder:
- “The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms.
- Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or Statute, that procedure should be strictly followed (See *Speaker of National Assembly v. Njenga Karume* [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of the Constitution for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* [2010] eKLR.”
28. In short, where the jurisdiction of the court is not properly invoked, the resultant proceedings are annulity and thus incurably bad. [See *Macfoy v. United Africa Co. Ltd* [1961] 3 All E.R. 1169].

Issue Number 2

Whether an order of permanent injunction can issue and/or be granted at the interlocutory stage and in any event on the basis of an application.

29. Other than the fact that an application for temporary injunction or otherwise, cannot be mounted in the absence of a substantive suit, which has been discussed in the preceding paragraphs, there is yet another aspect which merits a short discussion.
30. For coherence, the other aspect alluded to in terms of the preceding paragraphs relates to whether or not an order of permanent injunction can issue on the basis of an application or not.



31. To start with, even though the Applicants herein have not filed a substantive suit, same have however sought for an order of permanent injunction. Nevertheless, there is no gainsaying that an order of permanent injunction or perpetual injunction, is an order which can only issue after plenary hearing and in any event, at the tail end of the matter.
32. Given the foregoing, it is my humble view that the prayer for permanent injunction which has been sought for herein, is similarly premature and misconceived. Notably, no such order can issue on the basis of a temporary application.
33. To underscore the foregoing observation and in particular that a permanent injunction cannot issue on the basis of an interlocutory application, it suffices to take cognizance of the holding of the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR, where the court stated and held thus:
8. It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.
9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”
34. Finally, it is also imperative to cite and reiterate the holding in the case of *Kenya Consortium to Fight Aids, Tb & Malaria & Another V Brigitte Mukui Kitenge & 4 Others* [2013] eKLR, where the court held thus:
- “In fact the way the said prayers are crafted, they seem to be seeking perpetual injunctions. In *The Headmaster Kiembeni Baptist Primary School & Another v. The Pastor of Kiembeni Baptists Church* Mombasa HCCA No. 103 of 2004, Maraga, J (as he then was) held that when dealing with applications for interlocutory injunctions it is wrong to grant a permanent injunction whose effect is to conclusively decide the suit as issues of fact should be decided after hearing evidence and that Courts should be wary of parties who make applications for interlocutory injunctive orders which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders as order 39 does not provide for grant of permanent injunctions at interlocutory stage.”
35. In a nutshell, my answer to issue number two (2) hereinbefore is to the effect that the prayer for permanent injunction which has been sought for on the basis of the subject Application, which in any event has been mounted in the absence of a suit, is still borne and hence legally untenable.

Final Disposition

36. Flowing from the foregoing discussion, [details in the body of the Ruling], it is apparent that the Application beforehand is not only premature but misconceived. Consequently, the entire proceedings before the court be and are hereby struck out.



37. Costs ordinarily follow the event, unless there is good reason to warrant departure from the said position. However, in respect of this matter, there is no good reason and thus costs be and are hereby awarded to the named Respondents.

38. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2024.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – Court assistant

Mr. Washiali holding brief for Mr. Koimet for the Applicants

Mr. Motari [Principal Litigation Counsel] for the 1st, 3rd, 4th and 5th Respondents

No appearance for the 2nd Respondent

